

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**





77-6006

DOCKET # 77-6006

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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Mary Cox, as Administratrix of the  
goods, chattels and credits of  
Bobby Cox, deceased,

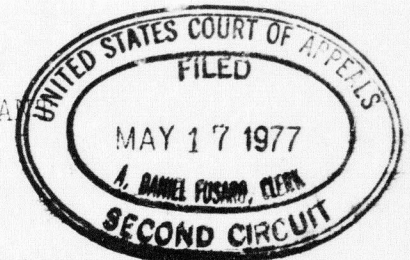
plaintiff-appellant,

- against -

Administrator of the Veterans Admini-  
stration, Veterans Administration,  
United States of America,

defendants-appellees.  
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BRIEF OF PLAINTIFF-APPELLANT



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No. 77-6006

QUESTIONS PRESENTED

1. Findings of facts as to failure to admit and/or improper discharge clearly against the weight of evidence.
2. With the evidence submitted below as a matter of law plaintiff must prevail, that is the trial judge was not at liberty to disregard the uncontroverted testimony of the plaintiffs under the circumstances in the case at bar as it was not improbable, not impeached on the bases of usual procedure.



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## STATEMENT OF THE CASE

This is an action in which the plaintiff-appellant seeks relief under the wrongful death under the Tort Claims Act, and trial took place before Honorable Judge Weinfeld, and a judgment was entered on December 21st, 1976, of which plaintiff-appellant has taken this appeal.

It is urged not as a matter of law, as the trial judge went beyond the proper ambit of fact finding the plaintiff-appellant must recover or at least have a new trial, as will be brought out by this brief more fully.



A. The Law

POINT I

LIABILITY OF HOSPITALS FOR SUICIDE IN GENERAL

The hospital was under a duty to use reasonable care to prevent plaintiff's decedent from committing suicide. A hospital or sanitarium owes its patients, and inmates a specific duty of care. If it neglects this duty, and through the neglect the patient or inmate is enabled to commit suicide, the hospital or sanitarium becomes liable for its negligence under the applicable wrongful death statutes.

It appears to be well settled that the owner of a non-charitable hospital or sanitarium is liable for damages for the suicide of a patient if it proximately results from the negligence of employees of the hospital.

New York Cases - Martindale vs. State (1935) 269 NY 554, 199 NE 667, affg 244 App Div 877, 281 NYS 686; Robertson vs. Charles B. Towns Hospital (1917) 173 App Div 235, 165 NYS 17; Daley vs. State (1948) 273 App Div 552, 73 NYS2d 584, affd without op 298 NY 880, 84 NE2d 801, and revg 187 Misc 99, 64 NYS2d 32; Spataro vs. State (1937) 166 Misc. 418, 2 NYS2d 737; Dimitroff vs. State (1939) 171 Misc 635, 13 NYS2d, 15 NYS2d 458; Callahan vs. State (1943) 179 Misc 781, 40 NYS2d 109, affd without op 266 App. Div 1054, 46 NYS2d 104; Dow vs. State (1944) 183 Misc 674, 50 NYS2d 342.

In Paulen vs. Shennick 291 Mich. 288 (1939) a patient with prior suicide attempts (not during last



hospital stay) was not watched carefully and it was held to be a question of fact for the jury.

In the case at bar the hospital record indicates a fear of plaintiff that they were after him. An interesting case is Robertson vs. Towns Hall, 178 AD 285 (1917) where there was no evidence of suicide mania but when somebody was after him. The court held that this delusion was sufficient to create a question of fact for the jury as to responsibility for the suicide which ensued through an open window. The case at bar indicates plaintiff's decedent attempted to go through an open window, per examination before trial of Elloise Roberts on September 7th, 1976 on pages 6 and 7 in the record herein and page 255A.



The following are excerpts from 11 ALR 2d 752: 10

The following principle was laid down in  
Pangle vs. Appalachian Hill (1922) 190 NC 833,  
131 SE 42:

"Ordinarily, when a hospital, like the present one, undertakes to treat a patient, without any special management or agreement, its engagement implies three things: 1) that its physicians and nurses and attendants possess the requisite degree of learning skill and ability necessary to the practice of their profession, and which others similarly situated ordinarily possess; 2) that its physicians, nurses and attendants will exercise reasonable and ordinary care and diligence in the use of their skill and in the application of their knowledge to the patient's care; and 3) that its physicians, nurses and attendants will exert their best judgment in the treatment and care of the case."

In determining the degree of care to which a patient in a hospital or sanitarium is entitled, his mental condition must be taken into account. In other words, the amount of care has to be in proportion to his needs and his ability to take care of himself. In Maki vs. Murray Hospital (1932) 91 Mont. 231, 7 F2nd 229, the court stated the rule as to the degree of care required as follows: "A hospital conducted for private gain is not an insurer of its patients against injury inflicted by themselves, but is only required to use ordinary and reasonable care and diligence in the treatment and care of patients; however, a patient is entitled to such



reasonable care and attention for his safety and his mental and physical condition may require; the degree of such care should be in proportion of the physical and mental ailments of the patient rendering him unable to look after his own safety." However, the court states further that it did not accede to the qualification of the rule in limiting it to the "known" condition of the patient and said rather that the trial court should have given the following instruction with respect thereto: "If the jury believes from the evidence that the...physicians or agents of the defendants discovered, on by the exercise of reasonable skill and care should have discovered...that it might reasonably be anticipated that he would act as he did; it was the duty of defendants to use the degree of care to have him watched or kept under observation to prevent him from doing so which ordinarily skillful, careful and prudent persons engaged in caring for and treating persons in his condition would have used." To a similar effect is *Hignite vs. Louisville Neuropathic Sanitarium* (1926) 223 KY 497, 4SW2 407.

Similarly, it was held in *Wood vs. Samanitan Institution* (1945) 26 Cal 2 847, 161 P 2 556, that a private hospital must exercise such reasonable care toward a patient as his mental and physical, if known, may require. The court added that the duty of care imposed on a hospital extends to safeguarding the patient from dangers due to his mental incapacity.



"A private hospital in which patients are placed for treatment by their physicians, and which undertakes to care for the patient and supervising such reasonable care in looking after and protecting a patient as the patient's condition, which is known to the hospital, through its agents and servants charged with the duty of looking after and supervising the patient, may require. This duty extends to safeguarding and protecting the patient from any known or reasonably apprehended danger from himself which may be due to his mental incapacity, and to use ordinary and reasonable care to prevent it."

*Woody Univ. vs. Shadburn* (1937) 47 GA App 643, 171 SE 192, *aff'd* 180 GA 599, 180 SE 137.

In *Dinnerstein vs. United States*, 486 F 2d 34, (2d Cir (Conn.) 1973) the hospital was found liable for the suicide of a patient known to be depressed where it assigns him to an unsupervised room and permitted uninstructed movement on the seventh floor of the hospital. The court held that suicide was sufficiently foreseeable to require supervision. This case is amazingly parallel to the case at bar where he was intermittently treated and signed himself out against medical advice and where hospital records showed prior suicide attempts but not in hospital stay in question.



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In Hignite vs. Louisville Neuropathic Sanitarium 223 KY 497, SW 2d 407 the court held that a patient who was depressed was owed a duty by the hospital to exercise ordinary care to prevent the suicide or to frustrate any attempts that might be made. The court further charged the doctors with knowledge that although no prior attempts were made depressed patient such as one in case at bar are to be anticipated such attempts.

Also see Paulen vs. Shinnick 291 Mich. 288, 289 NW 162, requiring reasonable precautions have to be employed and a greater degree of watchfulness is required for a patient who is prone to self destruction. Note on page 164 "Mrs. Beem, defendant's superintendant testified that, "any depressed patient is apt to commit suicide."

Also see Gries vs. Long Island Home 274 AD 938 (2nd Dept. 1948), liability of defendant was found when they knew of suicidal tendencies left appellant's intestate unattended.

In Wright vs. State of New York 31AD 2d 421 (1967) the following are interesting quotes:

"Expert medical testimony was not necessary in a case where the doctors dismissed a patient who was still actively suffering from a degenerative bone disease without warning the patient that he was still seriously ill. Ordinarily, expert medical



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opinion evidence, based on suitable hypotheses, is required, when the subject matter to be inquired about is presumed not to be within common knowledge and experience and when legal inference predominates over statement of fact, to furnish the bases for a determination by a jury of unskillful practice and medical treatment by physicians; but where the matters are within the experience and observation of the ordinary jurymen from which they may draw their own conclusions and the facts are of such a nature as to require no special knowledge or skill, the opinion of experts is unnecessary.' (Meiselman vs. Drown Hgts. Hosp., 285 N. Y. 389, 396.)

Despite the contentions of the State the essence of the negligence in this case is improper supervision and custodial care. (See Zophy vs. State of New York, 27 A D 2d 414.) In light of claimant's suicidal tendencies, his conceded mental illness, his impulsive and bizarre behavior since entering the hospital and the immediate danger of an opened unscreened window 15 feet above the ground coupled with his threat to jump out the window, a decision to leave him along with the door closed would appear to be inherently reckless and taken without any reasonable regard for the patient's safety.

Any benefits which might ultimately accrue from treating claimant in a permissive manner at this



juncture were far outweighed by the highly dangerous and imminent exposure of claimant's person to physical injury. (Santos vs. Unity Hosp., 301 N. Y. 153; Wilson vs. State of New York, 14 A D 2d 976; 16 Buffalo L. Rev. 649, Morse, Tort Liability of the Psychiatrist (III Injury or Death Resulting from Failure to Restrain or Control Patients, p. 665.)"

An interesting case is Martindale vs. State of New York 269 NY 554 (1935) whereby there was a recovery plaintiff's decedent died as a result of falling through an open window in toilet when she made a prior escape attempt two years earlier in a similar manner.

The appendix on pages 255A, 257A and 70A describes suicide attempts making these principles applicable to the case at bar. Also suicide ideations are shown at 37A. For violent tendencies see 260A and regarding a gun threat see 344A.



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POINT II  
LIABILITY OF HOSPITAL FOR FAILURE TO READMIT  
PLAINTIFF'S DECEDENT

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A number of courts have held that where a hospital refuses care in an emergency situation, liability may be predicated upon such refusal. In *Wilmington General Hospital, a corporation of the State of Delaware, defendant Delaw, Appellant vs. Danius M. Manlove, Administrator of the Estate of Daniel D. Manlove, plaintiff below, Appelle* 174 A2d 135 45 Del 15, an action was brought for wrongful death of an infant who died shortly after treatment was refused at a private hospital. The Supreme Court of Delaware posed the question, "Is there any duty on the part of the hospital to give treatment in an emergency case, re one obviously demanding immediate attention?" The court said, "It may be conceded that a private hospital is under no legal obligation to the public to maintain an emergency ward, or, for that matter, a public clinic, but the maintenance of such a ward to render first-aid to injured persons has become a well established adjunct to the order of business of a hospital. If a person, seriously hurt, applies for such aid at an emergency ward, relying on the established custom to render it, is it still the right of the hospital to turn him away without reason? In such a case, it seems to us, such a refusal might well result in worsening the condition of the injured person,



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because of the time lost in a useless attempt to obtain medical aid.

Such a set of circumstances is analagous to the case of the negligent termination of gratuitous services, which creates a tort liability."

The court further stated, "Liability on the part of a hospital may be predicated on the refusal of services to a patient in case of an unmistakable emergency, if the patient has relied upon well established custom of the hospital to render and in such a case."

In *Milton Williams, by next friend, vs. Hospital Authority of Hall County et al.*, 168 SE 2d 336, 119 G App 628, the GA Court of Appeals held that "A public hospital supported by public tax funds which assumes the duty of furnishing emergency first-aid facilities to injured persons cannot arbitrarily refuse its facilities to a member of the public obviously in need of such treatment."

The complaint alleged that the plaintiff presented himself for admission to the defendant public hospital with a broken arm and in a state of traumatic injury, suffering mental and physical pain, visible and obvious to the hospital employees and that the defendant refused to admit as a patient and treat him for his injury.

The court stated, "The defendant hospital contends that it has the absolute right to refuse to give emergency treatment to any person. No hospital, private or public,



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is under a common duty to accept everyone who appears for admission; nor is there a duty to maintain an emergency ward. However, this is not the same as the duty owed by a public hospital supported by public tax funds which does maintain emergency facilities for the benefit of the general public. The maintenance of such emergency facilities by a public hospital to render first aid to injured persons has become a well established adjunct to the main business of a hospital. Treatment is performed by the hospital staff and the patient is billed by the hospital rather than a physician. To say that a public institution which has assigned this duty and held itself out as giving such aid can arbitrarily refuse to give emergency treatment to a member of the public who presents himself with "a broken arm and in a state of traumatic injury, suffering mental and physical pain visible and obvious to the hospital employees" is repugnant to our entire system of government."

In *Salvatore J. Barcia, as Administrator of the goods, chattels and credits of Maria Garcia, deceased, plaintiff vs. the Society of the New York Hospital, defendant*, 241 NYS2d 373, 39 Misc 2d 526, an action for wrongful death of a child who was denied admission by the admitting physician of defendant hospital when first brought to the hospital resulted in holding the hospital liable for negligence. In that case, the court



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held that the evidence established negligence on the part of the hospital whose admitting physician turned away the two year old child who had been sent to the hospital by the family physician and who died the following day after she had been subsequently admitted to the hospital.

In *Steve Bourgeois, as Administrator of the Estate of Nicholas Geogrey Bourgeois, Appellant, vs. Dade County, Florida, a political subdivision of the State of Florida*, Appellee 99 So.2d 575 in an action for the death of a man who was admitted to the hospital, allegedly while unconscious and delivered into the hands of the police as a prank, and died from a puncture of the chest cavity by the ribs which had been fractured at the spinal column, the court ruled that the question whether there had been negligence in the treatment, examination and ultimate diagnoses of the decedent's condition by the hospital personnel and whether the treatment the decedent received at the hospital aggravated his condition and expedited his death were for the jury.

In *O'Neil vs. Montefiore Hospital*, 11 AD 2d 132 (1st Dept 1969) liability was found. A synopsis of this leading case pertinent in the case at bar is as follows:



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Plaintiff's decedent sustained a heart attack and was brought to the emergency room of Montefiore Hospital where a nurse was informed that the deceased was very ill, was suffering chest and arm pains and was thought to be having a heart attack and services of a doctor were requested and informed her they were members of Montefiore HIP Group. Thereupon the nurse informed them they did not take care of HIP patients and called a doctor and was informed to come back some three hours later. There was a dispute as to this by defendant's witnesses as to the profering of immediate medical aid. Plaintiff's decedent returned home and died shortly thereafter.

The court held the following issues were presented for the jury -

- 1) Whether or not there was an abandonment of the plaintiff's decedent by the doctor who was called and thereby being liable for malpractice.
- 2) Whether or not the nurse undertook to provide medical attention for the deceased and thereby liable in malpractice.

Another interesting case is New Biloxi Hospital, Inc., vs. Frazier 245 Misc 185 (1962). The facts in this case were that on the night of April 29th, 1960, sometime between 10:00 and 10:30 P. M., plaintiff's decedent was shot by Junior Wright with a shotgun in



the stump of his left arm. The blast made two large holes in the upper arm and tore away the brachial artery. He lay in the alley until 11:00 P. M. and bled considerably at the scene and on an ambulance enroute during a minute trip to New Biloxi Hospital. Ambulance attendance carried him into the emergency room, where one of hospital's nurses just looked at him and walked away. He was bleeding profusely at the time. There was no doctor on emergency call. It was some 30 minutes later when Dr. Smith arrived about 11:30 P. M. A nurse placed a towel on arm prior to that but made no attempt to stop bleeding. Dr. Smith after looking at wound and learning plaintiff decedent was a veteran recommended that he be transferred to a V. A. hospital. At about 1:00 A. M. he was placed in an ambulance for a ride to a V. A. hospital. The defendant was held liable for malpractice in failure to treat.

A very interesting case is *Homero vs. State of New York*; 42 AD 2d 422 (3rd Dept. 1975) where liability was held for failure of re-evaluation of mental patient prior to release. This is particularly in point as Mary Cox (sister) testified that there was no medical evaluation when she sought to re-admit decedent, 80A, 81A, 82A, 83A, 84A. Even Dr. Kesselman, the government's non-expert stated this would be a terrible thing if it happened, 171A and it would be gross negligence of the clerk 174A when Mr. Pascarelli could not find although provided with photograph of decedant, 192A. Dr. Kovacs on page 227A, 228A, and 229A of same opinion as Dr. Kesselman.



POINT III  
LIABILITY FOR HOSPITAL FOR PERMITTING PLAINTIFF'S  
DECEDANT TO SIGN HIMSELF OUT

Point 3A: The plaintiff's decedant was improperly allowed to discharge himself from the hospital as a result of said hospital's violation of its own rules and regulations.

As stated by Peter A. Pascarella, that in cases where a patient's departure is not medically approved, the patient will not be allowed to discharge himself if he is considered unable to make adequate judgment about his best interests. This of course is the irregular discharge involved in the case at bar.

In addition, the hospital's procedure regarding the discharge of depressed patients was violated. Said hospital's proper procedure as described, that if a person is so depressed that a physician felt his discharge would be detrimental, the hospital would not discharge him until his family is called and arrangements were made for him treatment elsewhere, if he refused to stay at the hospital. See 125A, 126A. Also Dr. Kovacs testified decedant was unable to make adequate judgment 226A.

The hospital's violation of its own rules is some evidence of negligence, in Haben vs. Cross County Hospital 37 NY 2d 888, (1975).



Point 3B: The plaintiff's decedent was allowed to sign himself out.

The hospital's own rules per deposition of Peter A. Pascarella states their rule on irregular discharge.

The only case we could find on point is Ferrandez vs. Baruch 96 NJ Super. 125 (1967). This case involved a suit by a widow for wrongful death because of suicide by her husband due to malpractice of psychiatrists. Plaintiff's decedent was arrested on May 25th, 1962 on assault and battery in regard to an incident where he attacked a friend with a kitchen knife and bit and kicked to bystanders. The police took plaintiff's decedent from the scene to the hospital where he remained until June 12th, 1962 when he was discharged into the custody of the police. The next day he was arraigned and transferred to Union County Jail on June 16th, 1962 where he hanged himself by means of his elastic socks. While in the hospital, decedent was administered thorazine until the day of his release but was not continued thereafter. Shortly after the decedent was admitted to the hospital the defendants concluded that the decedent had violent and homicidal tendencies which were deeply rooted and that the decedent needed treatment at a state mental institution. Defendants testified that they were unsuccessful in their attempts to get the plaintiff to sign the commitment papers. They did however advise the plaintiff of such



in this case contrary to what was done at the case at bar.

One basis of the plaintiff's claim was that the defendants were negligent in releasing the decedent despite their knowledge of his dangerous medical condition. A New Jersey statute gave the defendants the authority to commit the defendant to New York statute and as admitted in Pascaulli deposition, page 21, where he indicates there is a procedure to transfer patient to Bellvue if he refuses to become admitted.

The court held that it was not mandatory for the defendants to commit the decedent and in not committing the decedent they did not violate any standard of care. Even though this case did not so hold, it indicated the legal theory of our point of law and the changing concept of law and the trend is in the direction of establishing liability for failure to do an act. The law is as his Honor well knows not what the Supreme Court held last time but what it holds next time. Justice and good conscience demands a step forward.

An additional New York statute pertinent to the case at bar is section 31.27 of the Mental Hygiene Law of New York State. The director had the power to retain plaintiff's decedent if he was mentally ill and in the need of involuntary care and treatment 31.27 (a), and 31.27 (b) 6 of Mental Hygiene Law of New York.

See the following pages for application of principles to this case at bar where no commitment discussed or enforced 76A, 77A as should have been done, 162A, 163A, 187A, 217A, 218A.



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POINT IV  
DEGREE OF PROOF REQUIRED IN DEATH CASES

Plaintiff is not held to as high as a degree of proof in a wrongful death case as a plaintiff seeking to recover in his own right. *Noseworthy vs. City of New York*, Albany Dept. Co. 309 N.Y. 497, *O'Neil vs. Montefiore Hospital* 11 A. D. 2d 132.

In *Amanda Noseworthy*, as Administratrix of the Estate of Ernest Noseworthy, deceased, appellant vs. City of New York, respondent 298 NY 76 20 NE 2 747, in an action against the City for death resulting when decedent was run over by City's subway train, where no one except motorman knew what took place early in the morning on deserted station. The New York Court of Appeals held that the refusal to charge that in a death case, plaintiff is not held to the high degree of proof required where the injured person may take the stand and give his version of the accident was prejudicially erroneous.

The case of *Kenstein Swenson*, appellant vs. New York, Albany Despath Company, Inc., Def, and Ward La France Truck Corp., 131 NE 2 902 309 NY 497, respondent. Yolanda Trimboli, as Administratrix of the Estate of Anthony J. Trimboli, deceased, appellant vs. Ward La France Truck Corp., respondent involves a consolidated action for personal injuries to a rider



and death of the driver when a tractor in which they were riding, was unable to stop due to alleged brake failure and went off the road and overturned. The New York Court of Appeals held that as to the death action, the plaintiff is not held to as high a degree of proof of the cause of action as where an injured plaintiff can himself describe the occurrence.



POINT V

TRIAL COURT ERRED IN REFUSING TO CREDIT PLAINTIFFS' UNCONTROVERTED TESTIMONY, NOT BEING IMPROBABLE, NOT IMPEACHED ON THE BASIS OF USUAL PROCEDURE.

In its opinion the court stated "In order to credit the plaintiffs' testimony this Court would have to believe that on this occasion the staff of the Veterans Administration Hospital failed to follow every step of the prescribed procedure," page 6 of findings of facts.

As a matter of law testimony of what procedures were generally followed does not alter uncontroverted testimony as to what happened on a specific occasion. *Browning v. Crouse*, 356 F. 2d 178 (10th Cir. 1966) cert denied 384 U. S. 973.

In the *Browning* case where the finding of facts was made by a judge, the accused contended that he had not been advised of his right to counsel. To rebut this contention evidence of the court docket and an affidavit of the sentencing judge were introduced. The court docket indicated that the accused had been advised of his right but did not state specifically what rights. The judge's affidavit stated that he had no independent recollection of the case but that he could remember no case in which he did not advise the accused of his right to counsel. The court stated that, "When a record fails to show affirmatively that the required safeguards are provided their existence may not be inferred from a general statement of the practice,"



356 F. 2d 178 at 180.

In the case at bar, it is respectfully submitted, the court was in error when it resolved the conflict between general procedure and uncontroverted testimony as to a specific occasion in favor of the general procedures. The evidence introduced by the defendant as to general hospital procedures was insufficient as a matter of law to refuse plaintiffs' testimony *Browning vs. Crouse* 256 F 2d, 178, (10th Cir.) cert. denied 384 V. S. 973.

Furthermore, the court was in error in rejecting plaintiffs' uncontroverted testimony as to the visit on September 20th, 1972 to the Veterans Administration Hospital. In its findings of fact the court stated that, "Based upon the demeanor of witnesses and all relevant evidence, the court finds that plaintiff has failed to sustain her burden of proof that the decedent Cox accompanied by her, sought admission to the Veterans Administration Hospital in New York City on September 20th, 1972."

This statement by the court does not state in detail what aspects of a particular witness's demeanor lead it to credit or discredit testimony. The decision of the court fails to show in what manner plaintiff's testimony was not worthy of belief.



The Supreme Court has stated that the jury is not at liberty under the guise of passing upon a witness's credibility to disregard his testimony when it is not open to doubt from any reasonable point of view. *Chesapeake and Ohio R. Co. vs. Martin* 283 V. S. 209 at 216 (1931) The court then also stated in its opinion that "...the evidence of a party to the action is not contradicted by direct evidence, nor by any legitimate inferences from the evidence, and it is not opposed to the probabilities, nor, in its nature supervising or suspicious there is no reason for denying to its conclusiveness." 283 V. S. at 218.

In a case concerning a classification made by a local draft board the Supreme Court stated that "...when the uncontroverted evidence supporting a registrant's claim places him prima facie within the statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the act and foreign to our concepts of justice. *Dickinson v. United States*, 346 V. S. 389 at 397.



In *White Glove Building Maintenance Inc. v. Brennan*, 518 F. 2d 1271 (Ninth Cir. 1975) the Court stated that rejection of testimony which is clear positive and unimpeached was improper unless there is a detailed explanation of the fact finder's reason for doing so.

It has been held that although a trial judge has the right in a non-jury trial to reject testimony even though it is not directly disputed by contrary evidence this judicial prerogative should only be exercised sparingly and with upmost circumspection. *De Vries v. Starr* 393 F. 2d 9.

The rule as stated in *Corpus Juris Secundum* is as follows: "Uncontroverted evidence should ordinarily be taken as true, and uncontradicted evidence which is not improbable or unreasonable cannot be disregarded, even if it comes from an interested witness, and, unless shown to be untrustworthy, is conclusive; but evidence not directly contradicted is not necessarily binding on the trier of fact, and may under proper circumstances be given no weight, as where it is inherently improbable or unreasonable, self-contradictory, or inconsistent with facts or circumstances in evidence."

*Corpus Juris Secundum* Evidence section 1038

Applying these principles to the case at bar it is



again respectfully submitted that it is apparent that the trial judge exceeded his authority when he refused to credit plaintiff's testimony. The findings of fact by the Judge do not state sufficiently valid and detailed reasons for the rejection of plaintiff's uncontroverted testimony that on September 20th, 1972 plaintiff accompanied decedent to the Veterans Administration Hospital for treatment.

On page 6 of the findings of fact the Judge stated that based upon the demeanor of witness and all relevant evidence the Court finds that plaintiff failed to sustain her burden of proof.

The Judge did not state in detail what about the demeanor of the witnesses influenced his decision. Under the principles stated in the cases previously discussed a mere allegation concerning the demeanor of witness insufficient to permit a disregard of uncontroverted testimony.

This is not to deny the Judge in a non-jury trial the right to judge the credibility of witnesses. Rather it merely places upon the Judge the duty when rejecting uncontroverted testimony on the basis of lack of credibility to state in detail why he found plaintiff's testimony to be not worthy of belief. A mere statement alluding to her demeanor does not fulfill the principle that uncontroverted testimony can be



only rejected if detailed reasons for doing so are stated White Glove Building Maintenance Inc. v. Brennan 518 F. 2d 1271 (Ninth Cir 1975) Gung You v. Nagle 34 F 2d 848 (Ninth Cir 1929); Poy Hok v. Nagle 753 (Ninth Cir 1929).

In conclusion it is respectfully submitted that it was error for the court to reject plaintiff's uncontroverted testimony concerning the events of Spetember 20th, 1972. Error was committed because the decision placed entirely too much weight upon the general procedures of the Veterans Administration. Also, error was committed in the court's failure to substantiate its reason for discrediting uncontroverted testimony.



### B. EVIDENCE

First we will deal with the hospital records themselves.

The last hospitalization per appendix, page 291A by Dr. R. H. Hamilton form VA 10-1000a, abbreviated medical record indicated "This 28 year old black male, known chronic schizophrenic, with service connection was admitted to the closed ward on 8/20/72...He has not been declared incompetent but he tends to be out of touch with reality at times. On 8/21/72 he demanded to be discharged against medical advice and he was allowed to sign out AMA with his mother signing responsibility for him. She decided she would take him back to New York. He was given an irregular discharge. X Dg 1. schizophrenic, chronic, undifferentiated. Type of discharge - Irregular. On 8/20/72 VA form 10-10 M page 242A of appendix by L. J. Kurtin, "Patient very poor historian - confused, part of his psychosis... He is in need of care as his mother cannot control him ... Diagnosis schizophrenic - undifferentiated, acute anxiety state with confusion.

Last New York Hospital.

It is interesting to note that although Mr. Pascarelli testified the 90 day rule was not in existence during the dates involved in the lawsuit page 239A of appendix on



8/14/72 clinical records a note indicated, "I the undersigned am signing out of hospital Against Medical Advice. I understand I cannot be readmitted for 90 days." This lends credence to the plaintiff's version on trial that the trial judge below did not with any proper legal basis  
pt.

On form 10-1000 dated 7/19/72 page 262A of appendix CC he is getting violent and auditory hallucinations with insomnia started in 1968.

Very psychotic with delusions and hallucination...

On 7/14/72 page 263A of appendix Pt. with previous N P hosp for S/R now brought in by a sister because pt. is getting violent diagnosis S/R undiff type.

On 9/30/68 to 2/20/69 from VA 10-1000 page 248A of appendix by Dr. Richard Singer, "This service connected male was last discharged from the hospital on 2/20/69 after 106 days of hospitalization, The patient returned to his home in the South where he gainfully employed. The patient seemingly adjusted very well and bought himself a brand new car. However, very shortly before his current admission he became markedly tense. He expressed to his mother a feeling that he was about to be killed and his mother correctly became very concerned and took him to a VAH in North Carolina. The patient remained there only briefly and then signed out Against



Medical Advise after he decided to come to New York. He was accordingly admitted to his hospital on 3/2/70. Examination revealed essentially negative physical and laboratory findings, and the patient revealed significant delusional belief as well as hallucinatory experiences. As has happened in the past the patient became markedly restless and impatient to leave. He required close observation to avoid such a possibility and he gradually improved. On the whole he was motivated and cooperative and responded very favorably to Thorazine 100 mgs. three times daily. The patient's psychotic ideations quickly disappeared and he requested that he be discharged in order that he return to work. This was accordingly arranged. At the time of discharge the patient was regarded as being competent but showed moderate impairment to terms of his vocational capacity. There was moderate social impairment in this case. No medications were given at the time of his discharge."

In doctor's progress notes on 10/1/68, page 243A of appendix..."when heard voices threatening to kill him... feels someone is trying to kill him, mother dead, etc. Heard voices which frighten him dx schiz. Reac Acute Undiff type."

Doctor's notes on 11/1/68 page 283A of appendix... talks of "people in New York wanted to kill me because



the girl that I was engaged to is not getting enough \$."

Doctor's notes on 11/8/68, page 284A of appendix very agitated. Bangs on windows, tries to run, weeping and unable to communicate..."

Doctor's notes 11/8/68, page 283A of appendix markedly confused, again fearful, delusion, "mother is dead" and feels that he will be killed. Is desperate and fearful, tries windows, etc.

Doctor's progress notes 3/10/70 page 282A of appendix..."fearful something will happen assures me he will not escape..."

Doctor's progress notes 3/11/70 page 282A of appendix leave 2X...very tense, believes impregnated an employee etc. ...very tense.

Doctor's notes 3/14/70 page 282A of appendix, pt. has been trying to leave hospital several times today... that everybody here are laughing at him and bothering him also that his stay in hospital makes him nervous... ordered to be put in seclusion...

Doctor's progress notes 7/20/72 page 285A of appendix very psychotic 69 & 70 with haluc & delu was employed service. Has attitude of denial and defensiveness never wishes to remain in hosp. Refuses to answer "personal" questions, currently tense, withdrawn, hallucinated and defensive, dx schizophrenic. Singer.



Doctor's progress notes 7/24/72 page 286A of appendix, apparently hallucinated in office.

Doctor's progress notes 7/29/72 continues to be preoccupied, states he is hearing voices...

Doctor's progress notes 8/10/72 page 239A of appendix "I need to get out" ...continues to have difficulty concentrating, still hallucinating at intervals...is silent.

Nurse's notes after 10/1/68 page 287A of appendix, very depressed, thinks his mother is dead. That I belong to the FBI, and we have headquarters in New Jersey. "Somebody is out to get me." Said that took a bunch of sleeping pills last night the kind that you buy in a pharmacy without prescription. A. Rodriguez.

Nurse's notes 10/2/68, page 264A of appendix then started crying and said "I'm going to commit suicide if it's the last thing I do. Then everyone will be happy including my mother." C. Reid.

Nurse's notes 10/2/68 page 264A of appendix patient very aggravated, restless, complaining that the FBI is after him, wants to kill himself because the family would not him marry one of his girlfriends, hearing voices...



10/3/68 nurse's notes, received this patient in unlocked seclusion, page 265A of appendix.

Nurse's notes 10/3/68 page 265A of appendix patient appeared tense and stated, "I'd like to tell someone about it but I'm afraid to." Appeared very frightened, huddled on his bed with pillows across his face. "If I tell anyone, they'll kill me." Patient also stated he hears people talking about him... appears depressed.

Nurse's notes 10/3/68 page 265A and 267A of appendix the "power of a man is so great," that he would kill him. Stated that he was hearing voices but that he couldn't tell this writer what they were saying because the man could hear everything that he (Mr. Cox) was saying and would kill him if he said what the voices were saying... asked if his mother was dead a few times, said he "felt" she was dead.

Nurse's notes 10/14/68 page 25A of appendix patient appears to be in a depression mood...

Nurse's notes 10/31/68 page 252A of appendix "I wish I was happy..."

Nurse's notes 11/1/68 page 268A of appendix also fearful that these people will kill me, talking about the people who would harm him were mixed up in rackets, dope, crime - although appears very fearful



but won't estimate. Expressing strong desire to be transferred to a VA hospital in North Carolina. He is sorry he left home and came to New York...

Nurse's notes 11/8/68 page 255A of appendix  
On way back to the ward pt. ran toward window bang it with his fists and tried to open it trying to escape.

Nursing notes 10/31/68 page 253A of appendix  
Appears to be very agitated...

Nursing notes 11/10/68 page 256A of appendix  
Then changes to becoming depressed, crying spells.

11/11/68 Nursing notes page 288A of appendix  
Continues to have sorry moods...

Nursing notes 11/17/68 page 257A of appendix  
Patient went into large centre dormitory went to window, pushed up screen and tried to push himself through window. Patient was apprehended by LPN, Mr. Rodriguez. Patient placed in seclusion room in restraints...patient appears very paranoid, thinks staff is talking about him...

Nursing notes 11/21/68 page 258A of appendix  
Confused, delusional, thinking still present, suspicious, wants to leave hospital, needs constant supervision due to compulsive behavior. Seclusion room...

Nursing notes 11/20/68 page 289A of appendix  
Also walking toward the door of his room and looking



out window frequently...

Nursing notes 3/9/70 page 259A of appendix  
Agitated and anxious...

Nursing notes 3/10/70 page 259A of appendix  
Patient still very fearful about being here really  
wants to leave but feels he can't because of his sister...

Nursing notes 3/11/70 page 259A of appendix  
Pt. still very fearful and tearful most of day tried to  
leave ward early.

Nursing notes 3/11/70 page 290A of appendix  
Still appears frightened but less agitated...

Nursing notes 3/14/70 page 260A of appendix  
Patient noticed with his toilet articles bag and a  
paper bag and was going towards the door. When I  
tried to call him back to the ward the patient kept  
right on going stating that he is leaving. M.P.O.D.  
again informed and called RN for help in case  
patient became aggressively violent. Patient placed in  
seclusion and Thorazine 50 mg. P. M. injected at right  
buttock. Patient was banging at the seclusion room  
doors wanting to go to the men's room to urinate.  
Patient let out of seclusion when patient gave his word  
that he wouldn't try to leave ward and the statement  
which he told me and other aides that it makes him more  
agitated and disturbed if he is locked up. Ward visitors  
arrived 3 P. M....



Nursing notes 3/15/70 page 291A of appendix  
Appears depressed...

VA Hospital Fayetteville, North Carolina  
page 261A of appendix, 3/1/71...hears voices...

Nursing noted 7/19/72 page 280A of appendix  
Patient's complaints of hearing people talking to him...



The following is a summary of some of the pertinent testimony of Mary Rachel Cox on page 12 of the Cox direct testimony of the transcript and page 14 of the appendix. Page 12 of transcript - Page 32A of appendix

Q When he came back from the Armed Services did he develop any problems other than physical injuries?

A Yes.

Q As a result of that was he admitted to your knowledge to a Veterans Hospital in New York on or about September 30, 1968?

A Yes.

Q Did he remain there until about February the following year?

A Yes.

Q Did he also have various short intermittent treatments subsequent to that?

A Yes, he did.

Page 14 - Page 34A of appendix

Q Will you tell the Court what you observed -- and I realize you are not a psychiatrist, but what you observed those difficulties were?

A He was really depressed, restless. He couldn't sleep at night, he just walked. Most times he didn't want to eat food and he was really disturbed, threatening suicide. He wanted to know where my gun was, where did I keep it and at times he was just out of control and I couldn't do anything with him.



Page 16 - Page 36A of appendix

THE WITNESS: After he was in the hospital the first time, well, he never did get -- well, he never did get exactly right.

THE COURT: You mean from the time he returned following his Army service he was never right?

THE WITNESS: To my knowledge he wasn't right.

Q He served in Vietnam?

A He served in Vietnam.

Page 17- Page 37A of appendix

Q When for the first time did he talk about suicide?

A He talked about it, it might have been the second time he was out of the hospital.

Page 19- Page 39A of appendix

Q Did these discussions -- I realize it is over a number of years -- did they take place a few times or many times? How would you characterize it?

A A few times.

Q Did there come a time on August 20, 1972 that you brought your son to the Veterans Administration Hospital in Fayetteville, North Carolina for treatment?

A Yes.

Q Did you talk to anybody who admitted him at that time?

A I talked to the Veterans Administration lady.



Page 20 - Page 40A of appendix

Q Did you tell them about these incidents?

A Yes, I did.

THE COURT: What did you tell them?

THE WITNESS: I told them that he was -- that I couldn't do anything with him. He was acting violent.

THE WITNESS: They admitted him, but then after I went back the next day they told me that they didn't have the -- they told me how he was and everything and they said they didn't have the facilities down there to treat him, that I would have to bring him back to the hospital up here.

Q In New York are you talking about?

A Yes, in New York.

Q You mean to go back to the care of his doctor

Continued on Page 21 - Page 41A of appendix

that was taking care of him in New York?

A Yes.

Q Do you remember that doctor's name?

A Dr. Singer.

THE COURT: According to this stipulation this was on August 20, 1972 and then he was discharged the next day, August 21, 1972.



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Q Did there come a time when he committed suicide?

Continued on Page 33 - Page 54A of appendix

A Yes.

Q Were you present?

A No, I wasn't.

THE COURT: Where did this take place?

THE WITNESS: In North Carolina.

THE COURT: According to the stipulation this was on October 12, 1972.

MR. MURRAY: Right.

MR. PARKER: That is correct, your Honor.

Q Do you know anything about the gun he used, where he got that from?

A He got it from my uncle.

THE COURT: From whom, your uncle?

THE WITNESS: My uncle.

Q In any event, you know of your own knowledge that that is where he got the gun, is that correct?

A Yes.



Testimony of Mary Cox McNeil direct

Page 58 - Page 66A of appendix

Q Did you ever become aware of your brother's problems about depression and so forth?

A 1968.

Q Did he ever have problems like that prior to his going into the Service?

A No.

Q What was the incident that first brought it to your attention in I think you said 1968 was the first time

Continued on Page 59 - Page 67A of appendix

that you became aware of this problem, but do you remember what the incident was?

A Yes.

Q Would you please tell the Court what you recollect of that?

A Well, he was living in Jersey at the time and he called me at work and told me to come and get him. I asked him what was his problem and he was crying.

THE COURT: Mrs. McNeil, would you try and raise your voice a bit.

A I took off from work and I went to Jersey to get him and I brought him back on the bus and I put him in the VA Hospital on 23rd Street.

THE COURT: When was this?

THE WITNESS: 1968.



Q Would that be the first admission, approximately, September 30, 1968?

A Correct.

Q Where he stayed there until February 20, 1969?

A Right.

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Q Did there come a time in March of 1970 when he was rehospitalized?

A Yes.

Q Were you present when he went in?

A Yes.

Q Do you recall the circumstances of that admission?

A He started getting depressed again and I could always tell and he could tell himself that he needed medical attention.

Q By the way, when he was in the hospital in that period of time ending February, from September 30, 1968 through February 20, 1969, do you remember getting a call from another patient about some rather bizarre incident that took place?



On page 62 of the trial transcript and page 70A of appendix, witness testifies that she got a call from the hospital, where her brother threatens suicide.

On page 66 of the trial transcript and page 74A of appendix, witness testifies that the next hospitalization was July 19th, 1972. On page 67 of the trial transcript and 75A of appendix, witness indicated that he was depressed and nervous and she never had problems of depression prior to his going in the service, and she didn't think he was ready to be released, on or about August 14th, 1972.

On page 68 of the trial transcript and page 76A of appendix, witness indicates he signed himself out on that date, after having discussions with Dr. Singer, whereby she told Dr. Singer Bobby was not ready to be released.

On page 69 of the trial transcript and page 77A of appendix, witness indicates the doctor told her he was of age and he couldn't keep him there against his will and the doctor never suggested to her the possibility of a commitment order, during any of the hospitalizations incidentally.



Page 70 - Page 78A of appendix

A Well, he said if it was left up to him he would keep him there, but he couldn't keep him there against his will.

Q After your brother signed himself out as you put it, where did he go?

A Well, when he signed himself out it was early in the afternoon and I don't know where he went, but he didn't get home until late in the afternoon.

Q Then he arrived at your mutual residence late that evening?

A Right.

Q Did he stay there for some period of time thereafter?

A He stayed there until October 1st. Around then.

Page 72 - Page 80A of appendix

Q Do you remember approximately when he came back to New York?

A On or about September 19th.

Q 1972?

A Yes.

Q How did he look to you then?

A Well, he looked like he needed medical attention and he told me this is why he came back.



THE COURT: Read the answer, please.

(Record read.)

Q Did there come a time when you went with him somewhere to seek medical attention?

A Yes.

Q Do you recall the approximate date that was?

A September 20th.

THE COURT: The 20th of what?

THE WITNESS: 1972.

THE COURT: Of what month?

THE WITNESS: September.

Q That would be approximately a day or so after he came back to New York?

A Yes.

Q And where did you go to seek this attention?

A To the VA on 23rd Street and First Avenue.

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Q Approximately at what time of day did you go there?

A Around 5:30 or 6:00 o'clock.

Q In the evening?

A Yes.

Q This would be after your working hours?

A Yes.



Q Please tell the Court what you recall about what transpired on that day when you went to the Veterans Administration on or about September 20, 1972 at about 5:30 or 6:00 when you went to seek the care for your brother.

By the way, he was with you, was he not?

A Yes.

Q All right, please tell the Court what you recall.

A Well, when we went there and we told them who we were and what we were there for they pulled his records and they said that --

Q Would you like me to get you a glass of water?

A Yes.

(Pause.)

Q Would you be able to continue testifying?

MR. MURRAY: May I have the last question and

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her answer.

(Record read.)

A After they checked his record, they saw he signed himself out and it was against the hospital rules to be readmitted within 90 days.

Q Within 90 days you said?

A 90 days.



Q Is that what they told you?

A Yes.

Q First of all, when you went to the hospital where did you go, if you recall?

A Emergency or admitting, one of the two.

Q In any event, somebody pulled his records as you testified to?

A Yes.

Q Was your brother examined by a doctor on that day?

A No.

Q Was this person who pulled his records working in the office of some type?

A Yes. It was behind a partition anyways.

Q After you identified yourselves this person pulled your brother's records?

A Or had someone bring the records, however they

Page 75 - Page 83A of appendix

do it.

Q Was this person a doctor?

A I don't think so, no.

Q In any event, while you were present was your brother examined by anybody?

A No.

Q You know, as a doctor would examine a person.

A No.



Q Was your brother questioned by anyone?

A No.

Q You were simply told that statement that you mentioned, is that correct?

A I beg your pardon?

Q You were simply told that statement that you just mentioned?

A Yes.

Q Did you tell that person as to how you felt about your brother's problem at that point?

MR. PARKER: I will object to that as leading.

THE COURT: Well, it is leading but we will take it anyway.

A I told him, but I don't remember what she said besides the fact that the rules are the rules or whatever.

THE COURT: I can't hear you.

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MR. PARKER: I can't hear either.

THE COURT: Read the answer.

(Record read.)

Q What did you tell that person about your brother's problem, do you recall? The sum and substance of it.

A That I felt he needed to come back into the hospital; that he was getting depressed again.



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A Probably, because I think we went to the VA in Brooklyn.

Q After the 20th?

A Yes.

Q Tell us what happened over there.

A Admitting told us it was best that he go back to 23rd Street and First Avenue.

THE COURT: When did you go over to the hospital in Brooklyn?

THE WITNESS: I don't remember what date it was. It was after September 20th.

THE COURT: You don't recall how much after?

THE WITNESS: Maybe the next day or a day after, I don't recall.

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Q During that time, other than going to the Brooklyn hospital, did you take any other steps to see that your brother got medical care?

A We went to the Naval Hospital in St. Albans.

Q And what happened there?

A They told us the same thing, to take him back to First Avenue and 23rd Street.



Q Did you say to them, "We can't do that because of this 90-day rule"?

A Yes, I did.

Q What did they say to you over there?

A I think they said something to the effect they didn't understand why or something.

Q Did you see a doctor at the Brooklyn VA?

A I am not sure whether I saw a doctor or just

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somebody in charge.

Q Did you tell them about the 90-day rule over there?

A Yes.

Q What did they say?

A The same answer.

Q They didn't understand it?

A Right.



Testimony of Pascarelli - Direct

Page 103 of Transcript - Page 106A of appendix

Q But the 90-day rule was not in effect in 1972, is that correct?

A No.

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THE WITNESS: The 90-day rule was in effect, I think, until -- I don't know if it was '70 or '71 when it was changed and it was done away with where it was -- he was treated like any other veteran. however, he was spoken to as to his previous infractions and that he shouldn't be doing them and he should stay with the treatment because he would be taking up physician time and nursing time and we wouldn't be accomplishing anything for him if he was just going to walk in and out at his own pleasure.

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Q If the applicant had been a patient before what does the clerk then do?

A He would take his name, social security number, prepare a routing sheet, 10M, which is the routing slip, a charge slip for the record room to send us the clinical file.

---



Q And in regard to the patient --

A The patient would be processed. He would go to the nurse for his vital signs, TPRs and then to the physician.

THE COURT: What was that expression?

THE WITNESS: For his temperature, pulse and respiration.

Page 108 - Cross examination - page 111A of appendix

Q Mr. Pascarelli, you spoke about a 90-day rule, is that correct?

A Yes.

Q Do you have that rule with you here today, sir?

MR. PARKER: Mr. Murray, I have got a copy of it as I sent you a copy of it.

MR. MURRAY: If you could point it out to me I would appreciate it.

MR. PARKER: Yes.

Q I show you this. Is this the rule you are talking

Page 109 - Page 112A of appendix  
about, Rule No. 1107?

A That's right.

Q What does it say in the margin written?

A You mean "Change '72"?

Q Yes.



I don't believe that's what you testified to.

THE COURT: I didn't hear the answer. What is the answer?

THE WITNESS: It says, "Change '72."

Q That is not what you just testified to, is it? Didn't you say, if I remember correctly, that it was changed in '70 or '71?

A That's right.

Q What does that "Change 1972" mean?

A I beg your pardon. That is "Changed '72." It is not 1972, I am sure.

Q What does '72 mean?

A "Change '72" from what I gather.

Q Doesn't it mean 1972? What else can it possibly mean, Mr. Pascarelli?

THE COURT: That is arguing with the witness, isn't it?

Q What do you think "Change '72" means?

A I really don't know. I didn't write it.

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Q Do you remember testifying in examination before trial at the hospital and I was present and Mr. Parker was present?

A Yes, I do.

Q On August 11, 1976?

A Right.

---



Q Do you remember being asked and answering if this rule was in effect on that day?

A Yes.

Q Do you remember what you answered?

A I didn't remember whether it was or it wasn't, if I am correct.

Q You are the administrator, right?

A That's what I am. I am not a walking encyclopedia.

THE COURT: Do I understand your testimony to be that that rule, the 90-day exclusion rule, was not in effect in the year 1972?

THE WITNESS: That 's right.

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Q When you testified on August 11, 1976 you remembered the 90-day rule but you didn't remember if it was in effect on that day.

A Right.

Q What was the basis of the finding out of your knowledge that enabled you to testify today that it was changed in -- what did you say, 1970 or '71? I don't recall.

A Because of the changes that you told me to look up. Not that one, you have got another change.



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Q Is it not probable?

A Anything is probable.

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Q Is it not conceivable after 90 days when you are a little bit less staffed than full staffed as you pointed out that a former patient would come back either alone or with a member of his family, present themselves at the window, his record would be pulled and they would say, "Sorry, your 90 days aren't up yet. You can't be readmitted?"

A No. I don't think that would happen.

Q Could it happen?

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A Anything could happen.

Q So it is possible?

A Everything is possible.



Q To your knowledge, is there any procedure where an administrator or a director of the hospital can ask for a commitment of a mental patient prior to his being released?

A That is a medical determination, not the administrator or the director.

Q Assuming that you receive such a medical determination from your staff, is there --

A It wouldn't be from my staff --

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Q Let me finish the question if you don't mind.

Assuming there is such a medical determination from your staff, is there a procedure that you can follow to have such a patient committed?

A Yes.

Q Would you please tell the Court what that procedure was in 1972?

A The same as it is today: A two-physician certificate.

Q A what?

A You do it on a two-physician certificate to a state institution.

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THE COURT: That is under New York State law?

THE WITNESS: That is under New York State law, your Honor. That is if the physicians feel the man is a danger to himself and others, he is asking for his release, they feel he should not be released, they will contact the family first to have the family commit him on their signature. If they refuse and our medical staff still feels that he should be committed, that he needs this for his well being and others, then we can do it on a two-physician certificate through the State Department, which we handle through Manhattan State Hospital, your Honor, which is in our jurisdiction.

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Q Has this ever been done?

A Yes, it has.

Q And it should be done in a case where you receive a medical determination that you hold a certain patient, is that correct?

A Correct.

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"Q What were those regulations in effect in August and September of 1972?

"A This is on irregular discharge hospital patients. The classes of patients listed below will be given irregular discharges. The staff physician will enter a notation on SF 509 progress notes explaining a patient's



reason for leaving the hospital when the departure is not medically approved. The notation will be supported by a brief statement of the patient's condition. A, patients who refuse, neglect or obstruct care and treatment. B, who refuse to accept transfer as outlined in Chapter 11. C, patients who fail to return from authorized absences and patients who leave hospital supervision without approval of their physicians.

"These are the exceptions. Patients considered unable to make adequate judgment about their best interest or who are committed or who have institutional awards will be placed on absence as provided in Chapter 10 or placed on non-bed care or out-patient care."

Does that refresh your recollection? Did you answer that question in that way?

A I read that out of the manual, I think Mr. Parker has a copy of the manual, M1 Part 1.

On page 123 of trial transcript, page 126A of appendix, Cross Examination of Pascarelli and page 124 of trial transcript, appendix, page 125 of trial transcript, page 123A of appendix, Mr. Pascarelli is questioned about whether or not a patient was permitted



to have an irregular discharge, if there is a medical determination that he was unable to make an adequate judgment, and Mr. Pascarelli indicated that if he was so depressed that a physician felt his discharge would be detrimental we would not discharge him until the family was called and arrangements were made for his treatment elsewhere if he refused to stay there.

On page 126 of trial transcript, page 129A of appendix, Mr. Pascarelli indicated that they are unable to find an employee after being furnished with a photograph from the attorney for plaintiff-appellant, the one that was the employee in question on duty when Mary Cox McNeil went with the decedant to have him readmitted on September 20th, 1972.

On page 168 of trial transcript, page 162A of appendix, Dr. Kesselman admits after being asked a hypothetical that is the plaintiff's version of what happened in this incident, that this would not be following accepted medical practice and standards in a New York or Manhattan hospital.

On page 169 of trial transcript, page 163A of appendix, Dr. Kesselman indicates that the decedant needed further treatment.

On page 177 of trial transcript, page 171A of appendix and page 178 of trial transcript, page 172A of appendix, Dr. Kesselman admits that it is a terrible



thing if it happened that way, indicating of course in response to the hypothetical, as to not examining him on the attempted admission on September 20th, 1972.

On page 180 of trial transcript, page 174A of appendix, Dr. Kesselman indicates on the part of the clerk it would be gross neglect if he in fact did what Miss Mary Cox McNeil states if she did.

On page 192 of trial transcript, page 186A of transcript, Dr. Kesselman indicated if history was given and he threatened suicide in asking for a gun that this would give him imminence to the suicide threat.

On page 193 of trial transcript, page 187A of appendix, the doctor indicates it's good practice to advise the family members that they have an option of committing him.

On page 195 of trial transcript, page 189A of appendix, Dr. Kesselman is asked the following question, and gives the following answers:

"Q. Coming back to my other point, if he was not medically evaluated, you cannot in any way determine if he was properly handled, is that correct?

A. That is true."

On page 208 of trial transcript, page 201A of appendix, the following question was asked to Dr. Kovacs, and he gave the following answer:



"Q. Are you saying that the normal procedure in other hospitals in the area, if it was a service-connected V. A. disability, would be to send a patient, assuming treatment was needed, to the V. A. hospital?

A. That would be the normal procedure, yes."

On page 224 of trial transcript, page 217A of appendix, doctor indicates indicates that he would not only have proceeded to have the man committed, on the release of August 14th, 1972, but would advise the family as well.

On page 225 of trial transcript, page 218A of appendix, Dr. Kovacs has the same opinion for the Fayetteville release on August 21st, 1972.

On page 226 of trial transcript, page 219A of appendix, doctor indicates that Bobby Cox was not considered able to make an adequate judgment in his best interest, which is of course one of the exceptions to the rule read on the pages theretofore.

On page 228 of trial transcript, page 221A of appendix, doctor indicates there was a risk of suicide based on the hypothetical given in the decedant in the case herein at bar.

On page 234, 235 and 236 of trial transcript, pages 227A, 228A and 229A of appendix respectively, the doctor indicates that it was not proper procedure



not to have decedant Bobby Cox evaluated by a doctor on his attempt for readmission of September 20th, 1972, regardless of the so-called rule, and also further indicates that he believes that Bobby Cox, based on his past medical history could have achieved a level of being able to work fairly and regularly if they treated him on that date, rather than have him go out and commit suicide.

On page 241 of trial transcript, page 234A of appendix, the doctor indicates poor judgment can be poor medical practice.



## SUMMARY OF THE EVIDENCE OF LAW

It is clear from the foregoing analysis that the plaintiff-appellant testified with uncontroverted testimony that was within the realm of probability and she was not impeached. It is also clear that the usual practice of the hospital is not sufficient according to law to enable a fact finder even in a non-jury trial by a judge as brought out by the cases to find otherwise, especially without a very detailed explanation of why he did so. It is submitted that there is no basis to disregard it. As a matter of law, the plaintiff-appellant must prevail on that point.

That point alone, in the interest of justice, demands that a new trial be granted forthwith, in my humble opinion, at the very least. The so-called allegation of this rule not being in existence comes with disfavor in view of page 239A of appendix, where they required the decedent to put in his own handwriting, "I understand I cannot be readmitted for 90 days." It is very interesting to speculate on why they would have to put that in the record if that was not the rule, or at least if that was not what the hospital personnel believed it to be the rule and transmitted the same to the plaintiff's decedent.



Secondly, this case presents a novel question of law in that mental hospitals or psychiatric hospitals should be required to treat emergencies as have the physical injury cases. It is contended this was an emergency situation as was established by the plaintiff's later suicide, and the failure to have a physician examine plaintiff's decedant was gross negligence, on the part of the clerk, even by Dr. Kesselman's own admission on page 174A of the appendix.

It is respectfully submitted that based on the brief, appendix and the record herein that this court has the power to enter judgment in favor of plaintiff-appellant, and send it back for an assessment of damages or fix an amount, subject to agreement by the parties or have a trial for assessment of damages if the parties do not so agree.



## CONCLUSION

In view of the foregoing, plaintiff-appellant submits that either a new trial should be granted or a decision and/or judgment be rendered in favor of the plaintiff-appellant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

GERALD MURRAY, one of the attorneys for the appellants, certifies that on the 13th day of May, 1977, I did serve one (1) copy of the foregoing Brief and the Appendix related thereto upon the attorney for the Appellees by mailing the same, postage prepaid, first class, as follows:

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